

# **A Roadmap of South Dakota's Mental Health Involuntary Commitment and Voluntary Hospitalization of Adults**

Revised July 29, 2013

## **Introduction**

### **I. QUALIFIED MENTAL HEALTH PROFESSIONAL**

The term “qualified mental health professional”, means a physician licensed pursuant to chapter 36-4 or a member of one of the professions listed as follows who is in good standing with any relevant licensing or certification boards:

1. A psychologist who is licensed to practice psychology in South Dakota.
2. An advanced practice nurse with at least a master’s degree from an accredited education program and either two years or one thousand hours of clinical experience that includes mental health evaluation and treatment.
3. A certified social worker with a master’s degree from an accredited training program and two years experience in a mental health setting.
4. A person who has a master’s degree in psychology from an accredited program and two years of supervised clinical mental health experience and who meets the provision of subdivision 36-27A-2(2).
5. A counselor who is certified under chapter 36-32 as a licensed professional counselor-mental health.
6. A counselor who is certified under chapter 36-32 as a licensed professional counselor and has two years of supervised clinical experience in a mental health setting and who is employed by the State of South Dakota or a mental health center.
7. A therapist who is licensed under chapter 36-33 as a marriage and family therapist with two years supervised clinical experience in a mental health setting.
8. A physician assistant who is licensed under chapter 36-4A and either two years or one thousand hours of clinical experience that includes mental health evaluation and treatment.
9. A professional as listed in subdivisions (1) to (8), inclusive, who is employed by the federal government and currently licensed in that profession in another state, in good standing with the licensing board, and acting within the scope of the professional’s license.

Except as provided in subdivision (9) and § 36-4-20, each qualified mental health professional shall meet all licensing and certification requirements required by the State of South Dakota for persons engaged in private practice of the same profession. However, the private practice licensure requirements for persons referred to in subdivisions (3) and (6) do not apply to those employed by the State of South Dakota, mental health centers, or

organizations that have a formal clinical supervision arrangement by an employed person who is licensed at the private practice level. (27A-1-3)

To complete examinations as part of the emergency commitment process, qualified mental health professionals shall participate in training as required by the Department of Social Services prior to serving in this capacity. (27A-1-7)

Each member of a board of mental illness shall participate in training as required by the Department of Social Services prior to undertaking their duties. (27A-7-9)

## **II. INVOLUNTARY COMMITMENT OF ADULTS**

All commitments must be made under the emergency commitment procedures governed by SDCL 27A-10.

### **1. Who is subject to commitment? The Substantive Criteria**

A person is subject to involuntary commitment if:

- a. The person has a serious mental illness;
- b. Due to the serious mental illness, the person is a danger to self or others; or has a chronic disability
- c. The person needs and is likely to benefit from treatment.

*“Serious Mental Illness”* is defined as: A substantial organic or psychiatric disorder of thought, mood, perception, orientation or memory which significantly impairs judgement, behavior or ability to cope with the basic demands of life. Mental retardation, epilepsy, other developmental disabilities, alcohol or substance abuse, or brief periods of intoxication, or criminal behavior do not, alone, constitute serious mental illness. (27A-1-1 (24))

*“Danger to Self”* is defined as:

- a. Behavior due to serious mental illness which supports a reasonable expectation that the person will inflict serious physical injury upon himself in the near future. Such behavior shall be evidenced by the person’s treatment history and the person’s recent acts or omissions which constitute a danger of suicide or self-inflicted serious physical injury. Such acts may include a recently expressed threat if the threat is such that, if considered in the light of its context or in light of the person’s previous acts or omissions, it is substantially supportive of an expectation that the threat will be carried out; or
- b. A reasonable expectation of danger of serious personal harm in the near future, due to a serious mental illness, as evidenced by the person’s treatment history and the person’s recent acts or omissions which demonstrate an inability to provide for some basic human needs such as food, clothing, shelter, essential medical care, or personal safety, or by arrests for criminal behavior which occur as a result of the worsening of the person’s serious mental illness. (27A-1-1(7))

*“Danger to Others”* is defined as: a reasonable expectation that the person will inflict serious physical injury upon another person in the near future, due to a serious Mental Illness, evidenced by the person’s treatment history and the person’s recent acts or omissions which constitute a danger of serious physical injury for another individual. Such acts may include a recently expressed threat if the threat is such that, if considered in light of its context or in light of the person’s recent previous acts or omissions, it is substantially supportive of an expectation that the threat will be carried out. **(27A-1-1(6))**

*“Chronic Disability”* is defined: a condition evidenced by a reasonable expectation, based on the person’s psychiatric history, that the person is incapable of making an informed medical decision because of a serious mental illness, is unlikely to comply with treatment as shown by a failure to comply with a prescribed cause of treatment outside of an inpatient setting on two or more occasions within any continuous twelve month period, and, as a consequence, the person’s current condition is likely to deteriorate until it is probable that the person will be a danger to self or others. **(27A-1-1(4))**

*“Co-occurring substance use disorder”* is defined as: persons who have at least one mental disorder as well as an alcohol or drug use disorder. **(27A-1-1(5))**

## **2. Mobile Crisis Team**

Referral to mobile crisis team or crisis intervention team certified law enforcement officer—voluntary resolution or placement. If any law enforcement officer or qualified mental health professional in a clinic or hospital has probable cause to believe that a person required emergency non-medical intervention, as an alternative to a petition for commitment pursuant to chapter 27A-10, or apprehension and transfer to an appropriate regional facility, the officer or qualified mental health professional may refer the person to the direct supervision of any member of a mobile crisis team or crisis intervention team certified law enforcement officer.

If any member of the mobile crisis team or the crisis intervention team certified law enforcement officer accepts direct supervision of the person, in writing, the member or officer may:

- a. Resolve the intervention on a voluntary basis, at the clinic or hospital, at the person’s home, or other location, or with the assistance of any public or private community services that the patient is willing to accept. Any team member may request the assistance of law enforcement for the voluntary transfer of the person.
- b. Direct that the law enforcement officer proceed with the apprehension of the person and transport the person to either an appropriate regional facility for an emergency intervention and mental illness examination or an approved treatment facility offering detoxification services for chemical dependency emergencies.

*“Mobile crisis Team”* is defined as: an interdisciplinary team of one or more mental health professionals able to respond to any person in the community, usually visiting the person at home, for mental health and chemical dependency or abuse intervention. **(27A-10-20(3))**

*“Appropriate Regional Facility”* is defined as: A facility designated by the Department for pre-hearing custody. The facility must be as close as possible to where the person was apprehended. The facility must be no more restrictive of mental, social, or physical

freedom than is necessary to protect the person or others from physical injury. In determining the least restrictive facility, considerations shall include the preferences of the apprehended person, the environmental restrictiveness of the setting, the proximity of the facility to the patient's residence, and the availability of family, legal, and other community resources and support. **(27A-1-1 (2))**

### **3. Procedures for Apprehension**

#### **A. Petition Filing**

Any person eighteen years of age or older may file a petition with the county board of mental illness alleging that the subject is severely mentally ill and in such condition that immediate intervention is necessary for the protection from physical harm of him/herself or others. The petition must be on a form, verified by affidavit, and must include the reasons for its filing and other information mandated by statute. **(27A-10-1)**

After examining the petition, the chair of the board of mental illness may order law enforcement or a designee to apprehend the person if the chair has a probable cause to believe that the person meets the commitment criteria. The person must be transported to an "appropriate regional facility." At this point, the person may not be taken to the South Dakota Human Services Center. Moreover, the person may not be detained in a jail unless there is no other appropriate regional facility available. In any event, the person may not be held in a jail for longer than twenty-four hours on a mental illness hold alone. **(27A-10-2)**

#### **B. Apprehension by Peace Officer**

A peace officer may apprehend a person even if a petition has not been filed. The officer, however, must have probable cause to believe that the person is severely mentally ill and in such condition that immediate intervention is necessary to prevent harm. The officer must transport the person to an appropriate regional facility other than the Human Services Center. The restrictions on use of a jail, explained above, continue to apply. A petition must be filed in a forthwith manner with the chair of the county board of mental illness. If a petition is not filed with the chair of the county board within twenty-four hours, the person must be released. **(27A-10-3; 27A-10-4)**

#### **C. Right to Notice**

Immediately after a person is apprehended, she/he must be notified both orally and in writing of the following:

- a. The right to immediately contact a person of choice;
- b. The right to immediately contact and be represented by an attorney;
- c. That she/he will be examined by a qualified mental health professional, designated by the chair of the county board, within twenty-four hours of being taken into custody to determine whether custody should be continued;
- d. The right to an independent examination if custody is continued; and the right to a hearing within five days, six, if there is a Saturday, Sunday, or holiday within that

time period, or seven if there is a Saturday, Sunday, **and** holiday within that time period.

- e. The cost of post commitment proceedings, including habeas corpus, and costs of court-appointed counsel are the person's responsibility and a lien may be filed upon the person's real and personal property to insure payment. **(27A-10-5)**

#### **D. Examination Within Twenty-Four Hours**

Within twenty-four hours after apprehension, the person will be examined by a qualified mental health professional designated by the chair of the county board.

Preceding the examination, the examiner must identify himself/herself and explain the nature and purpose of the examination. The person must be informed that the examination is being performed to assist in the determination of whether custody should continue. The person must also be informed that the results of the examination may be used as evidence in a commitment hearing. The examiner must immediately report the findings to the chair of the county board.

If the chair of the county board determines that the examination does not support finding that the person meets the involuntary commitment criteria, the person must be released. The county in which the person was apprehended must provide transportation back to that county, if the person so desires.

If the examination and an investigation of the petition indicate that the person does meet the commitment criteria, the board chair may order continued detainment in an appropriate regional facility. At this point, the person may be transported to the Human Services Center, but only if necessary. **(27A-10-6; 27A-10-7)**

#### **E. Notice to Community Mental Health Center**

Upon being informed of the apprehension of a person, the chair of the county board shall notify the area's community mental health center. **(27A-10-16)**

#### **F. Request for Voluntary Admission**

The chair of the county board shall determine whether a detained person may voluntarily admit him/herself into a facility or program. **(27A-10-7.1)**

### **4. The Hearing Process**

#### **A. Service of Notice**

Copies of the petition and notice of hearing shall be personally served forthwith by the sheriff or a constable, or an elector of any state not a party to the action that is specifically designated by the board on the person prior to the hearing. The notice must include the following:

- a. The time, date, and place of hearing;
- b. The right to be represented by an attorney retained by the person or appointed by the board chair;

- c. Notice of the twenty-four hour examination by a qualified mental health professional;
- d. The qualified mental health professional and the defense lawyer have access to the person's medical records; and
- e. The right of the person to obtain an independent examination at his/her own expense; if indigent, the county will bear the expense. (27A-11A-5)

## **B. Assignment of Counsel**

If upon completion of the twenty-four hour examination, it is determined that a hearing shall be held, the board chair must immediately assign counsel to the person if she/he has not retained an attorney. In no instance may a person not be represented by counsel. (27A-11A-7)

## **C. Duties of Counsel**

An appointed attorney shall represent the interests of the person, advocate the person's legal rights, and otherwise fully represent the person. The attorney shall serve as an advocate for the person rather than a guardian ad litem. (27A-11A-26)

## **D. Timing of Hearing**

A person is entitled to an involuntary commitment hearing within five days after being taken into custody, within six, if there is a Saturday, Sunday, or holiday within that time period or within seven days if there is a Saturday, Sunday, **and** holiday within that time period. (27A-10-8)

## **E. Location of Hearing**

The hearing shall be held in the county courthouse or such other place as the board chair may designate with due regard to the rights, safety, and comfort of the person. (27A-11A-28)

## **F. Personal Appearance and Right to Present Evidence**

A person has the right to appear personally at the hearing and testify on his/her own behalf, but may not be compelled to do so. If a person decides not to appear, the board may not inquire into the reasons for that decision. The person has the right to require the attendance of witnesses, to cross-examine witnesses, and to present evidence. (27A-11A-11)

## **G. Closed Hearing**

The board may exclude the public from attending a hearing. The board, however, must permit the attendance of any person requested to be present by the proposed patient. (27A-11A-11)

## **H. Pre-Hearing Treatment**

If the person is receiving treatment prior to the hearing, the qualified mental health professional shall take all reasonable precautions to ensure that the person is not so affected by drugs or other treatment as to be hampered in preparing for or participating in the hearing. The board must be provided with a record of all treatment the person has received since being taken into custody. **(27A-11A-10)**

## **I. Testimony on Alternative Placements**

An independent qualified mental health professional must assess the availability and appropriateness of treatment alternatives including treatment programs other than inpatient treatment. This mental health professional must testify at the hearing and explain what alternatives are or should be made available, what alternatives were investigated, and why any investigated alternatives are not deemed appropriate. **(27A-10-9)**

### **1. Outpatient Commitment Order**

- c.** If a person fails to comply with the requirements specified in an outpatient commitment order or a treatment order, and the person's treating physician or staff of the specified outpatient treatment program believes that the person's current condition is likely to deteriorate until it is probable that the person will be a danger to self or others, the program director or the person's treating physician may notify law enforcement.
- d.** The outpatient commitment order or treatment order constitutes authorization for a law enforcement officer to transport the person to the designated outpatient treatment program or to the treating physician's office for the purpose of making reasonable effort to obtain compliance.
- e.** No person may be detained for more than one hour unless the person consents.

## **J. Rules of Evidence**

The rules of evidence shall be followed at all hearings and reviews. **(27A-11A-24)**

## **5. The Hearing Determination**

Upon completion of the hearing, the board may order the involuntary commitment of the person if it makes the following findings by clear and convincing evidence:

- A.** The person meets the involuntary commitment criteria in **SDCL 27A-1-2**, as explained above;
- B.** The person needs and is likely to benefit from the treatment which is proposed; and
- C.** The commitment is to the least restrictive treatment alternative. **(27A-10-9.1)**

*"Least restrictive treatment alternative"* is defined as the treatment and conditions of treatment which, separately and in combination, are no more intrusive or restrictive of mental, social, or physical freedom than necessary to achieve a reasonably adequate therapeutic benefit. The following considerations shall be taken into account in determining the least restrictive alternative:



1. The values and preferences of the patient;
2. The environmental restrictiveness of treatment settings;
3. The duration of treatment;
4. The physical safety of the patient and others;
5. The psychological and physical restrictiveness of treatments;
6. The relative risks and benefits of treatments to the patient;
7. The proximity of the treatment program to the patient's residence; and
8. The availability of family and community resources and support. **(27A-1-1 (15))**

If the above findings are not made, the board shall order that the person be released. The referring county shall provide the person with transportation to the county where he was taken into custody, if the person so chooses. **(27A-10-9.1)**

## **6. Duration of Commitment**

Upon completion of the hearing, the Board of Mental Illness may order the involuntary commitment of the person for an initial period not to exceed **ninety days**. **(27A-10-9.1)**

## **7. Record of Proceedings**

A court reporter shall attend all hearings of the county board and keep a stenographic or tape record of the proceedings. A person who has been committed may request a certified transcript or tape recording of the hearing. The person must pay for such transcript or recording unless indigent. **(27A-11A-2)**

## **8. Appeal**

An order of involuntary commitment may be appealed to the circuit court. The person shall be advised of the right to appeal both verbally and in writing upon the termination of the hearing. **(27A-11A-25)**

## **9. Review Hearings**

Within ninety days after the involuntary commitment of a person who is still under the commitment order, the county board shall conduct a review hearing to determine if the person continues to meet the commitment criteria. Notice of this hearing shall be given to the person and his/her attorney at least ten days in advance. If the person has not retained counsel, the board chair must appoint an attorney at least ten days in advance of the review hearing.

At the time of notice, the person and attorney shall be informed of all evidence that will be considered at the review hearing. Any evidence subsequently discovered shall be immediately transmitted to the person and attorney. The person is entitled to all rights and procedures applicable to an initial commitment hearing except that a new petition need not be filed.

If, upon completion of the review hearing, the board finds by clear and convincing evidence that the person continues to meet the commitment criteria, the board may order continued commitment to the same or alternative placement for a period not to exceed six months. The person is entitled to another review hearing within the six-month period. If the board issues

another order of continued commitment, the next review shall be held within six months after the order. If the second six-month review justifies continued commitment, the board may order continued commitment for up to twelve months. Subsequent reviews shall be conducted within each twelve months thereafter that the person remains under commitment. **(27A-10-14)**

## **10. Additional Review Hearings**

The board may schedule review hearings in addition to those required by the above stated provision. **(27A-10-15)**

## **11. Noncompliance with Treatment Order**

If a person ordered to undergo a program of treatment does not comply with the order, the county board must conduct a hearing to determine compliance or noncompliance. If noncompliance is determined, the board may order an alternative program of treatment which is consistent with the commitment criteria. The person is entitled to representation by counsel and to notice delivered at least five days in advance of the hearing. **(27A-11A-21)**

**A.** If a person fails to comply with the requirements specified in an outpatient commitment order or a treatment order, and the person's treating physician or staff of the specified outpatient treatment program believes that the person's current condition is likely to deteriorate until it is probable that the person will be a danger to self or others, the program director or the person's treating physician may notify law enforcement. No person may be detained for longer than one hour unless the person consents. **(27A-10-20)(27A-10-21)**

## **12. Unsuccessful Treatment**

If at any time while a person is under an order of commitment, it comes to the attention of the county board that the program of treatment has not been successful; the board shall conduct a hearing. This hearing must be held within five days, or six if there is a Saturday, Sunday, or holiday within that time period, or seven if there is a Saturday, Sunday, **and** holiday within that time period. The person shall be represented by counsel and be given at least five days notice of the hearing.

If the board finds that the program of treatment has not been successful, it shall order an alternative program of treatment consistent with the commitment criteria. The administrator, facility director, or program director of the facility to which a person is committed is under a duty to notify the county board whenever a treatment program has proven unsuccessful. **(27A-11A-22)**

## **13. Transfer of Patient**

A person under an order of commitment may not be transferred to a more restrictive facility without a hearing before the county board prior to the transfer. The person has the right to be represented by an attorney and must be provided notice at least five days in advance of the hearing. The only exception is when the transfer is necessary to prevent the immediate danger of physical harm to the person or others. In such a case, the board chair may

authorize the transfer pending the hearing. The hearing must be held within five days of the transfer or six, if there is a Saturday, Sunday, and holiday within that time period.

If upon completion of the hearing, the board finds by clear and convincing evidence that the transfer is in accord with the commitment criteria, the board may so order the transfer. The transfer hearing shall not substitute for any of the review hearings the person is otherwise entitled to. **(27A-11A-19)**

### **III. VOLUNTARY INPATIENT TREATMENT FOR ADULTS**

#### **1. Admission Criteria (27A-8-1)**

A person, eighteen years of age or older, may apply to the South Dakota Human Services Center or other inpatient psychiatric facility for voluntary hospitalization. The person must execute a written application for admission and be capable of providing an informed consent to the admission.

*“Informed consent”* is defined as: Consent voluntarily, knowingly and competently given without any element of force, fraud, deceit, duress, threat or other form of coercion after conscientious explanation of all information that a reasonable person would consider significant to the decision in a manner reasonably comprehensible to general lay understanding. **(27A-1-1(12))**

The person may be admitted if the following requirements are met:

- a. If, after the examination by a staff psychiatrist, the facility director determines that the applicant is clinically suitable for inpatient treatment. If a staff psychiatrist is unavailable at the time of application, admission may be granted pending an examination by a staff psychiatrist within one working day;
- b. A less restrictive treatment alternative is inappropriate or unavailable;
- c. The applicant is in need of and will likely benefit from treatment which is available at the facility;
- d. The requirements in **SDCL 27A-8-15** have been met. This section requires that before admission, an explanation be made to the applicant of the nature of inpatient status, including the types of treatment available, and restraints or restrictions to which she/he may be subject. This explanation must include the fact that the person's status may be converted to involuntary status under certain circumstances. The person must also be informed of all rights to which she/he is entitled; and
- e. The applicant does not have medical needs that are beyond the capacity of the center of the facility.

Section **27A-8-15** also requires that the applicant give an informed consent to admission both orally and in writing upon an application form. The application form must contain specified information. A copy of the signed application form and a written statement of the patient's rights shall be given to the patient and any one other person designated by the patient.

#### **2. Voluntary Status Required**

An applicant for voluntary admission, who is clinically suitable for voluntary inpatient treatment, shall be admitted only on such voluntary status. If admission is denied, the

facility must provide the person with a referral to other facilities or programs that may be appropriate. **(27A-8-16)**

### **3. Voluntary Admission by Guardian or Attorney-in-fact**

If a person is incapable of providing an informed consent to treatment, the legal guardian or attorney-in-fact may exercise a substituted informed consent to admission. The admission criteria continue to apply to the admission. The patient is entitled to all the rights accorded other voluntary patients, including the right to immediate discharge upon written request. **(New Section 13)**

### **4. Voluntary Admission by Next of Kin**

If a person is incapable of providing an informed consent to treatment, the person's next of kin may exercise a substituted informed consent to admission. The admission criteria continue to apply to these admissions. The person may be admitted for a period not to exceed fourteen days. The patient is entitled to all the rights accorded other voluntary patients, including the right to immediate discharge upon written request.

During the fourteen-day admission period, the consenting next of kin may file a petition in circuit court for an order authorizing appointment of the petitioner as guardian of the person for continuing the admission. If a petition is filed within the fourteen day period, the admission of a non-objecting person may continue until the court can hold the hearing. If a petition is not filed within the fourteen day period, the person must be discharged upon the expiration of the fourteen-day admission period. **(27A-8-19)**

### **5. Periodic Assessments**

Thirty days after the voluntary admission of a patient and every ninety days thereafter, the facility director must review the patient's records and assess the need for continued inpatient treatment. If continued treatment is indicated, the director must request from the patient an oral and written affirmation of informed consent to continued admission. If the patient was admitted upon substituted informed consent and continues to be incapable of exercising an informed consent, substituted informed consent to continuing admission must be obtained. A failure to affirm substituted informed consent constitutes notice of intention to terminate inpatient treatment. **(27A-8-17)**

### **6. Release Procedures**

#### **A. Request for Release**

An adult voluntary patient has the right to immediate discharge upon written notice of his intention to be released. The facility must promptly supply the patient with the written discharge form upon request. **(27A-8-10)**

#### **B. Detainment After Request for Release**

A voluntary patient who has submitted a written request for release may be detained for a period not to exceed twenty-four hours (excluding weekends or holidays) from receipt of the written notice if the facility has probable cause to believe that she/he meets the involuntary commitment criteria. The facility director must immediately notify the patient of this hold and explain its nature. The director must also notify the chair of the county board or a peace officer of the time of receipt of the patient's notice, the time the hold was initiated, the circumstances necessitating the hold, and the time a petition for involuntary commitment will be filed. This information must also be delivered to the patient.

If a petition is not filed with the chair of the county board within twenty-four hours of the facility's receipt of the patient's request for release (excluding weekends and holidays), the patient must be immediately discharged. If a petition is timely filed, the patient may be held pursuant to the involuntary commitment procedures explained above. **(27A-8-10.1)**

## **7. Notice of Release Procedures**

Upon voluntary admission, at the end of the first six months of hospitalization, and annually thereafter, the patient shall be given a separate written notice of release procedures. A copy of these procedures shall also be given to any one other person the patient so designates. Release procedures must be prominently and permanently displayed in every psychiatric unit. **(27A-8-14)**

## **8. Conversion to Involuntary Status Without Request for Release**

The facility may file a petition for the involuntary commitment of a voluntary patient even in the absence of a request for release. A petition may be filed only for the following reasons:

- a. The facility has probable cause to believe the patient meets the involuntary commitment criteria; and
- b. The patient, including one admitted upon a substituted informed consent of a guardian, attorney-in-fact, or next of kin, is unwilling or unable to consent to the treatment deemed necessary by the treating physician and there are no other appropriate treatments to which the patient is willing or able to consent; or
- c. The patient is unwilling or unable to affirm consent to continued admission when statutorily required. **(27A-8-11.2)**

# **IV. INDIVIDUAL RIGHTS**

## **1. Application of Rights**

Chapter 27A-12 governs the rights of any individual subject to the authority of the mental health code, either on a voluntary or involuntary basis.

## **2. Competence**

No person may be deemed incompetent to exercise any right or privilege accorded citizens of South Dakota solely by reason of detention, admission, or commitment under the mental health code. (27A-12-1.2)

### **3. Privacy and Dignity**

Each person has the right to a humane environment that affords appropriate individual privacy, individual dignity, and reasonable protection from harm. These rights shall be respected at all times and upon all occasions, including when a person is taken into custody, detained or transported. (27A-12-1)

### **4. Notice of Rights**

A person is entitled to prompt oral and written notice of his/her rights upon entering a facility or program. A written list of rights shall be prominently displayed in an accessible location. (27A-12-3)

### **5. Rights Enumerated**

Any person, if otherwise qualified, has the right to:

- a. Refuse to be photographed or fingerprinted;
- b. Remain silent and fully clothed;
- c. Have access to
  - Toilet facilities upon request
  - His/her own money unless a conservator has been appointed;
  - To keep as much money in his/her personal possession as he/she deems is necessary;
  - To purchase personal articles;
  - A minimum of two hours exercise daily;
- d. Receive any visitors during regular visiting hours; communicate with individuals outside the facility; send and receive unopened mail; adequate writing material, envelopes and stamps; access to a telephone; local calls without charge; long distance calls if paid for or charged to another number.
- e. Wear his/her own clothes; keep his/her own toilet articles; adequate storage space;
- f. Converse with others in private;
- g. Receive prompt, adequate medical treatment;
- h. Voluntary participation in religious services in accordance with personal needs, desires, and capabilities and also in accordance with the basic right to freedom of religion. (27A-12-3.1)

#### **A. Reasonable Limitations**

Reasonable limitations may be placed on the above-listed rights on an individual basis if essential to prevent the person from violating a law or to prevent substantial and serious physical or mental harm to self or others. Each limitation must be approved by the facility director. (27A-12-3.1)

### **6. Spiritual Treatment**

Each person has the right to treatment by spiritual means through prayer. **(27A-12-3.2)**

## **7. Access to Rights Protection Services**

A person has the right to engage in private communications in appropriate facilities with any available right protection service or system such as the South Dakota Advocacy Services. **(27A-12-3.3)**

## **8. Access to Attorney and Physicians**

A person may communicate with a legal representative or a private physician subject to the facility's normal access restrictions. The person's legal representative shall have access to all records and information pertaining to the person. **(27A-12-3.18)**

## **9. Labor**

A person may perform labor for a facility only upon a voluntary and compensated basis. One half of such compensation is exempt from collection for services provided by the facility. Discharge may not be conditioned on performance of labor. **(27A-12-3.4; 27A-12-3.5)**

## **10. Treatment Programming**

- A.** Each person shall have a physical and mental examination within forty-eight hours (excluding Saturdays, Sundays, and holidays) of admission. **(27A-12-3.8)**
- B.** Each person has the right to a comprehensive individualized treatment program developed by appropriate qualified mental health professionals, including a psychiatrist. The treatment plan may not consist solely of chemical or drug therapy unless supported by sufficient psychiatric and medical opinion.

A person has the right, according to his/her capabilities, to participate in the planning of services to be provided. This right includes participation in the development, review, and revision of the treatment program. The person is entitled to a reasonable explanation of:

- a. Such persons' mental and physical condition;
  - b. The objective of treatment;
  - c. The nature and significant possible adverse effects of recommended treatments;
  - d. The reasons why a particular treatment is considered appropriate;
  - e. The reason for any limitation on rights; and
  - f. Any appropriate and available alternative treatments, services, and types of providers. **(27A-12-3.6)**
- C.** Treatment programs shall be designed to achieve discharge at the earliest possible time and to maximize each person's development and skill acquisition. A treatment team qualified mental health professional must periodically review, follow-up, and update all individualized programs. **(27A-12-3.6)**
- D.** Each person has the right to an aftercare program which outlines available services and recommendations for continued post-discharge placement or treatment. Participation in the plan is discretionary and refusal to participate shall not be a reason for continued detention. **(27A-12-3.7)**

- E.** Within ten days after commitment, the facility or program director shall review the need for continued commitment and assess whether an individualized treatment program has been implemented. If a treatment program has not been implemented within ten days, the person shall be released immediately unless he/she agrees to continue treatment on a voluntary basis. **(27A-12-3.9)**
- F.** Within thirty days after the above review and within every ninety days thereafter, the director shall assess whether commitment should be continued. **(27A-12-3.9)**

## **11. Transfer From Involuntary to Voluntary Status**

An involuntarily committed person has the right to apply for a transfer to voluntary status. The transfer shall be forthwith granted unless the person is unable to understand the nature of voluntary status or the transfer would not be in the best interests of the person. **(27A-12-3.10)**

## **12. Emergency Medical Procedures**

Emergency surgery and other emergency medical procedures may be performed without the patient's consent or court or board order only in a life-threatening emergency where there is not time to obtain consent or court or board authorization; or, if the patient is incapacitated as defined in **SDCL 34-12C-1** and substitute informed consent is obtained from an appointed guardian, an attorney-in-fact, or a person with authority pursuant to **SDCL 34-12C**.

If it is ordered by a physician, psychotropic medication may be administered to a person in an emergency to prevent serious physical harm to the person or to others. Psychotropic medication, electroconvulsive therapy (ECT), and other such medical treatment may also be administered if the attending physician and one other physician determine that administration of such medication, therapy, or treatment is necessary. The medication, ECT, or such other necessary medical treatment may only be continued for up to 10 days. **(27A-12-3.11)**

## **13. Experimental or Intrusive Procedures**

A person has the right to refuse to be subjected to research and experimental or intrusive procedures, including electroconvulsive therapy and psychotropic medication. If an involuntarily committed person refuses treatment, then psychotropic medication, ECT, and such other medical treatment may be administered if it is ordered by the court or board. **(27A-12-3.12)**

## **14. Refusal of Treatment—Psychotropic Medication**

### **A. Treatment Refusal**

1. A person who is voluntarily committed has the right to refuse any treatment. **(27A-12-3.12)**
2. For a person who is refusing treatment and is involuntarily committed and deemed incapacitated, a substitute informed consent can be provided by their appointed



guardian, attorney-in-fact, or person with authority. Substitute informed consent may be withdrawn at any time, and is effective immediately upon request. **(27A-12-3.11)**

## **B. Psychotropic Drug, ECT, and Other Medical Treatment Refusal**

### **1. Right to Refuse**

If an involuntarily committed person refuses the administration of psychotropic drugs, ECT, and such other medical treatment as may be necessary for the treatment of the person's mental illness, it may be administered if it is ordered by a court or board under the criteria in **SDCL 27A-12-3.15. (27A-12-3.12)**

### **2. Petition**

A facility may petition the circuit court or board of mental illness for authority to administer psychotropic medication and such other medical treatment, including electroconvulsive therapy, to an involuntarily committed person if, in the opinion of the administrator or attending psychiatrist and the person's treating physician, the treatment will be medically beneficial and are necessary because:

- a. The person presents as a danger to self or others;
- b. The person cannot improve or the person's condition may deteriorate without the medication or such treatment; or
- c. The person may improve without the medication or such treatment but only at a significantly slower rate and the person's treating physician determines that the person is incapable of consenting to such treatment because the person's judgment is so affected by mental illness that the person lacks the capacity to make a competent, voluntary, and knowing decision concerning such treatment .**(27A-12-3.13)**

### **3. Notice—Time of Hearing**

The petition and notice of hearing shall be personally served upon the person immediately upon filing of the petition. The notice of hearing shall include:

- a. Notice of time, date, and place of hearing;
- b. Notice of right to counsel and the appointment of counsel if indigent; and
- c. Notice of the right to an independent evaluation at the person's expense or if indigent, the county's expense; and
- d. The cost of any commitment proceedings, treatment, medication and any hearing relating to medication, any post-commitment proceedings, including habeas corpus, and costs of court-appointed counsel are the person's responsibility and a lien may be filed upon the person's real and personal property to insure payment.

If counsel has not been retained, the court or board shall appoint counsel immediately upon filing of the petition. A date shall be set for the hearing within fifteen days of the filing of the petition. The hearing shall be a priority on the court's or board's calendar. One seven-day continuance may be allowed upon a showing of good cause. **(27A-12-3.14)**

#### **4. Hearing Determination on Competency**

The court or board may exercise a substituted judgement on the administration of psychotropic medication and such other medical treatment as may be necessary for the treatment of the person's mental illness only upon a showing by clear and convincing evidence that the person is incapable of making an informed treatment decision and the drugs are essential under the criteria listed in #2 above. **(27A-12-3.15)**

#### **5. Time Limit for Court Order**

A court or board authorizing the administration of psychotropic medication and such other medical treatment may not exceed one year. In any event, the court's or board's order shall terminate:

- a. If the person is judicially restored or restored by the board as competent to make the treatment decision; or
- b. The treating physician or medical director/consulting psychiatrist determine that the medication and such treatment are no longer necessary. **(27A-12-3.16)**

#### **6. Review of Drug Treatment**

The treating physician and medical director/consulting psychiatrist must review the need for continued treatment by personal examination of the person at least every thirty days. **(27A-12-3.16)**

#### **7. Prohibition of Psychosurgery, Aversive Stimuli, and Substantial Deprivations**

No person shall be administered or subjected to psychosurgery, aversive stimuli, or substantial deprivation.

*"Aversive Stimuli"* is defined as: Anything which, because it is believed to be unreasonable unpleasant, uncomfortable, or distasteful to the person, is administered or done to the person for the purpose of reducing the frequency of a behavior but does not include authorized restrictive treatment procedures.

*"Substantial Deprivations"* is defined as: The withdrawal or withholding of basic necessities or comforts which is intended to subject the person to significant discomfort, inconvenience, or unpleasantness. **(27A-12-3.22)**

#### **8. Restrictive Treatment Procedures**

Restrictive Treatment procedures which impose physical restrictions on the person:

- a. Must be part of an individualized treatment program that sets out conditions justifying its use and approved by a peer committee review;
- b. May not be used as punishment or for convenience of staff;

- c. May be implemented only as necessary to prevent assaultive or otherwise harmful behaviors with specific documentation justifying its use;
- d. If physical restraints or seclusion in a separate room is employed, appropriate attention shall be paid every fifteen minutes to the person;
- e. Shall require a written order at least every fifteen days during the first sixty days of the implementation and every thirty days thereafter;
- f. May not be considered seclusion or restraint if carried out as a part of an approved behavioral treatment program. **(27A-12-6.1)**

## **9. Seclusion or Restraint**

The use of seclusion or restraint:

- a. Requires clinical justification and shall be employed only to prevent immediate harm to the person or others;
- b. May not be employed if less restrictive means of restraint are feasible; the rationale for use must address the inadequacy of less restrictive intervention techniques;
- c. May not be employed as punishment or for the convenience of staff;
- d. Must be authorized by a qualified mental health professional, physician's assistant, or nurse practitioner;
- e. Justification of use shall be supported by a personal clinical assessment of the person and documented in the person's records;
- f. May not exceed one hour, at which time an order from a qualified mental health professional, physician's assistant, or nurse practitioner is required if seclusion or restraint is to be continued; such order must be time-limited and shall not exceed twenty-four hours;
- g. May not be used in a manner that causes undue physical discomfort, harm, or pain to the person; appropriate attention shall be paid every fifteen minutes to the person unless more frequent attention is warranted. **(27A-12-6.2)**

## **10. Grievances**

A person may assert grievances with respect to infringement of rights. The person is entitled to have a grievance considered in a fair, timely, and impartial procedure which provides meaningful review. **(27A-12-32.1)**

## **11. Habeas Corpus**

Any person involuntarily committed, confined, detained, or restrained may apply for a writ of habeas corpus. If the court finds that an involuntarily committed person continues to meet the commitment criteria, continued commitment may be authorized. The person may apply for another writ upon alleging that the commitment criteria are no longer met. **(27A-12-32.2)**

## **12. Exercise of Rights**

The provisions of the mental health code may not be construed as replacing or limiting any other rights, benefits, or privileges. The exercise of rights afforded by the code are not subject to any reprisal, including reprisal through the actual or

threatened denial of any treatment, benefits, privileges, or other rights. **(27A-12-33.1)**

## **V. ACCESS TO AND CONFIDENTIALITY OF INFORMATION**

- 1.** All records of proceedings are subject to the confidentiality and access provisions of Chapter 27A-12. Any records of an involuntarily detained person who is released prior to or upon completion of a commitment hearing shall be sealed. **(27A-11A-3)**
- 2.** If a person is admitted, involuntarily committed, or discharged from the Human Services Center, his next of kin or guardian shall be notified unless notification is determined by the attending physician to be detrimental to the person. **(27A-12-34)**
- 3.** A complete statistical and medical record shall be kept for each person receiving mental health services or being detained under the code. A person has the right to access, upon request, to his mental health records. The person, however, may be refused access to:
  - a.** Information in the records provided by a third party under assurance that the information remain confidential; and
  - b.** Specific material in the records if the qualified mental health professional responsible for the mental health services concerned has made a determination in writing that access would be detrimental to the person's health. However, the material may be made available to a similarly licensed qualified mental health professional selected by the person; this professional may, in the exercise of professional judgement, provide the person with access to any or all parts of the material or otherwise disclose the information contained in the material to the person. **(27A-12-25; 27A-12-26.1)**
- 4.** The following information is to be kept confidential and not open to public inspection unless specifically excepted as noted:
  - a.** Information acquired by a peace officer pursuant to authority under the Code; **(27A-12-25.1)**
  - b.** Records of concluded proceedings for which the information was acquired subject to order of the circuit court;
  - c.** Information in the record of the person and other information acquired in the course of providing mental health services unless:
    - 1.** Both the holder of the records and the person, the parent of a minor, or a guardian, consent to disclosure;
    - 2.** Absent consent, only if requested under the following circumstances: **(27A-12-27)**
      - a.** Pursuant to orders of subpoena of a court of record or subpoenas of the Legislature;
      - b.** To a prosecuting or defense attorney or to a qualified mental health professional as necessary to participate in a proceeding governed by this title;

- c. To an attorney representing a person who is presently subject to the authority of this title;
- d. If necessary in order to comply with another provision of law;
- e. To the Department of Human Services if the information is necessary for the discharge of a responsibility placed by law;
- f. To a state's attorney or the attorney general for purpose of investigation of an alleged criminal act either committed by or upon a patient of the Human Services Center

**5. Any release of information by a holder of records shall be:**

- a. Approved by the facility director; recorded to include information released, to whom, the date, and purpose of the release. The identity of the person to whom the information pertains may not be disclosed unless germane;
- b. Any person receiving confidential information shall disclose the information to others only to the extent consistent with the authorized purpose for which the information was obtained. (27A-12-31; 27A-12-32)

## **VI. DISCHARGE**

### **1. Discharge of Voluntary Patient**

The facility director may at any time discharge a voluntary patient whom the director deems suitable for discharge. (27A-14-1)

### **2. Discharge of Patient**

If the facility director or attending psychiatrist determines that a patient under a guardianship no longer requires inpatient treatment and has been accepted for placement in a community setting, the guardian shall remove the patient within three days of notification. Failure to so remove shall result in notice to the guardianship court for further disposition. (27A-14-1.1)

### **3. Discharge Prior to Commitment Hearing**

- A. If a person is detained at the Human Services Center pending the commitment hearing, he/she shall be released upon a determination by the administrator that the commitment criteria are not met. Following the release, the referring county shall provide the person with transportation to the county where he was taken into custody, if the person so chooses. (27A-14-1.2)
- B. If the director of a facility in which a person is detained prior to a commitment hearing determines that the person does not meet the commitment criteria, the director shall so notify the chair of the county board. If the chair agrees, the person shall be released. Transportation to the county where the person was taken into custody shall be provided by the referring county, if the person so desires. (27A-14-1.3)

### **4. Discharge of Involuntarily Committed Patient**

An involuntarily committed person shall be discharged when the director of the facility or program of commitment determines that the patient no longer meets the commitment criteria.

The county board must be notified of the discharge and provide the patient with transportation to his/her residence within forty-eight hours, if the patient so desires. (27A-14-2; 27A-14-3)

## **5. Provisional Discharge**

A patient may be provisionally discharged. The administrator must notify the county board of the provisions of the discharge which may not extend beyond the duration of the original commitment. (27A-14-4)

## **6. Leave Status**

A patient, upon approval of the director, may be placed on a leave status from the facility. A leave may not exceed thirty days and the status may not extend beyond the duration of any involuntary commitment order. While on leave, an involuntarily committed patient shall receive all reviews and hearings mandated by law or be discharged from the commitment order. (27A-14-1.4)

## **7. Public Assistance**

The Secretary of Social Services shall provide methods whereby a patient shall be assisted in qualifying for all available public assistance benefits provided by state or federal law. (27A-14-14)

# **VII. COUNTY BOARD OF MENTAL ILLNESS**

1. Each county shall have a county board of mental illness, although two or more counties may jointly contract to establish one board serving all contracting counties. (27A-7-1)
2. A county board of mental illness shall consist of two people who shall be residents of the county and appointed by the board of county commissioners for a three-year non-consecutive term. A law trained magistrate or lawyer, who need not be a resident of the county, shall serve as the board's chair. The chair shall be appointed by the presiding judge of the county's circuit court.

The state's attorney for the county may not serve on the board of mental illness. The appointing authority may appoint alternative board members. (27A-7-1)

3. In the case of the temporary absence or inability of any member or alternate to serve, the remaining board members shall temporarily appoint replacements so that the original composition of the board is retained. (27A-7-3)
4. Each member of a board of mental illness is required to participate in training as required by the Department of Social Services prior to undertaking their duties. The training shall

include the duties, procedures, and rights of any person coming before the board of mental illness. **(27A-7-9)**

5. The board of mental illness has jurisdiction over all petitions for involuntary commitment and is responsible for the treatment of an involuntarily committed person and for the safekeeping of persons subject to involuntary commitment within its county. The board may do any act of a court which is necessary and proper for the discharge of its duties. **(27A-7-4)**
6. If it appears that any board member has a conflict of interest, he/she may be removed by a filing of an affidavit with the board chair. Unless the affidavit appears clearly frivolous, it shall be granted. In the event of disqualification, a duly designated alternate or temporary replacement shall serve. **(27A-7-3.1)**
7. Board members shall be compensated at an hourly rate as determined by the county commissioners. Members shall also be reimbursed for mileage and other actual expenses incurred in the performance of their duties. **(27A-7-8)**

## **VIII. CO-OCCURRING**

If the county board finds that an individual meets criteria for an involuntary commitment and it is ordered, then the board may, at the same hearing or a subsequent hearing, consider a petition for the treatment of any co-occurring substance use disorder, on the grounds that the person is an alcohol or drug abuser who habitually lacks self-control as to the use of alcoholic beverages or other drugs and the person;

1. Has threatened, attempted or inflicted physical harm on self or on another and that unless treated is likely to inflict harm on self or on another; or
2. Is incapacitated by the effects of alcohol or drugs; or
3. Is pregnant and abusing alcohol or drugs.

After hearing all evidence the board may also order a commitment for such co-occurring disorder to any appropriate treatment facility, for a period not to exceed ninety days. **(SB 6 Section 18)**

## **IX. OTHER PROVISIONS**

1. **State Mental Health Programs:** See SDCL Chapter 27A-3.
2. **South Dakota Human Services Center:** See SDCL Chapter 27A-4.
3. **Local Mental Health Centers:** See SDCL Chapter 27A-5.
4. **Interstate Cooperation in Mental Health Services:** See SDCL Chapter 27A-6.
5. **Costs of Care and Treatment in State Facilities:** See SDCL Chapter 27A-13.
6. **Treatment of Minors:** See SDCL Chapter 27A-15.